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No. 3705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION
(a corporation),
Plaintiff in Error,

vs.

D. J. GOVER,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Topical Index

Table of Contents.

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I.

THE FACTS OF THE CASE.

The statement of the facts of this case contained in the brief for defendant in error follows so closely the statement contained in our opening brief that we have very little occasion to criticise the same. There are, however, several matters stated as facts which give an erroneous impression, and we shall proceed to point these out.

The first misleading statement is found at page 5 of the brief for defendant in error. It is there stated that the original ladder, which was constructed of

native spruce and which was torn down after it had been in place five or six years, was removed because it was no longer fit for use. It is true that Patching, the superintendent of defendant's hatchery, did testify on cross-examination at page 117, that this was the reason for the removal of the original ladder. This testimony of his must, however, be taken in conjunction with his further testimony also upon cross-examination, where he testified as follows:

> "Q. Why was that ladder taken down?
> A. To make room for the sawed lumber ladder. When we first started there we made all of our ladders out of poles,—when we first started there we had no sawmill, and when we got the sawmill—it is only a small sawmill—we were using a large amount of lumber and lumber was very scarce, and we made all of our ladders out of poles; so after awhile, when he got more lumber, we made the ladders out of sawed lumber.
> Q. And is that the reason the pole ladder was replaced by the other ladder? A. Yes, sir."

The second misleading statement is found at page 6 of counsel's brief, where it is stated that Dr. Ellis, who was the medical witness called by defendant, was "their doctor", meaning the company doctor of defendant. As appears upon page 130 of the transcript, upon the direct examination of Dr. Ellis, he was neither under contract with the defendant nor was he in their employ in any way either at the time of the trial or at the time Gover first came to see him.

On page 24 of the brief, counsel asserts that plaintiff testified positively that he could not tell the age

of the timber. No reference to the transcript is given in support of this statement, and we can find nothing in the record to substantiate it. Plaintiff twice, on pages 86 and 87 of the transcript, asserted that he had had experience with timber, and that he was in a position to tell whether or not, when exposed to the elements for twenty years, it would decay. He also testified that it was not a long-lived timber.

II.

THE COURT ERRED IN REFUSING THE REQUEST OF DEFENDANT FOR AN INSTRUCTED VERDICT.

Counsel has sought to meet our contention under this heading first by attempting to differentiate the numerous authorities cited by us in support of our theory that the ladder in question was a simple tool; next by trying to bring this case within the rule of *Pacific Telephone & Telegraph Co. v. Starr,* 206 Fed. 157; and, finally, by citing four cases which it is contended show that the ladder from which Gover fell was no ladder at all.

1. The attempted differentiation of the cases cited by us has not been successful:

Most of the grounds of differentiation relied upon by counsel are trivial. They have no bearing upon the real holding of the cases which we have cited. We will take these cases up in the order in which counsel has referred to them, and show that the

attempted differentiation has, in no case, been successful.

It is true that in *Cahill v. Hilton,* 13 N. E. 339, the language of the court with reference to a ladder being a simple tool may be a dictum, inasmuch as, after writing the opinion in question, the court reached the conclusion that the accident might not have been caused by the ladder at all. The reasoning, however, of this dictum is unexceptionable, and the case is strongly persuasive. The fact that the ladder in the case was but twelve feet high is not an important distinction so long as it is borne in mind that it was a simple ladder, as was the one in the case at bar, instead of being a complex extension affair, such as the one in use in the *Starr* case.

The attack made upon *Nosal v. National Harvester Company,* 187 Illinois Appellate 411, is wholly unjustified. It is contended that in the report of that case the facts are very meagerly stated. No details are set forth concerning the exact nature of the ladder. It must therefore be presumed that it was a simple ladder having no special features. We certainly do not question the statement of counsel when he says that if the facts were disclosed and were shown to be similar to those disclosed in the *Starr* case, that we would then not seriously contend that the doctrine announced by the case would be the law in this jurisdiction. Inasmuch, however, as the facts as reported do not show even an approach to the conditions existing in the *Starr* case,

we believe that *Nosal v. National Harvester Company,* supra, strongly supports our position.

Counsel complains that the extract contained in our brief from the case of *Sivley v. Nixon Mining Drill Co.,* 164 S. W. 772, shows that in order to come within the simple tool doctrine a ladder must be an ordinary one, and that, therefore, not every ladder falls within the doctrine. We admit this to be true. The *Starr* case establishes such a limitation upon the rule without question. We also admit that the case of *Ritt v. True Tag Paint Co.,* 69 S. W. 324, cited and distinguished in the *Sivley* case, shows that there is a further limitation upon the doctrine to the effect that if repairs have been made and the employee has thereby been misled into the erroneous belief that the ladder is again sound, the employer may be held liable.

The distinction attempted to be made with regard to *Christy v. Southwestern Missouri Railway,* 110 S. W. 694, is that in that case the plaintiff was held to have assumed the risk because he knew that the condition of the ladder was old and weak, having used it with that knowledge. It is our contention that plaintiff in the case at bar, although he had not used the ladder long, had ample opportunity as an expert in woods to observe any defects which were so patent as to be easily observable.

We do not understand the attempted differentiation of *McKay v. Hand,* 47 N. E. 104. It is said that in that case the court took into consideration

the fact that there was no evidence to show that the ladder was rotten, and that the court did not indicate what its decision would have been had there been evidence of that nature. There is, however, in the case not the slightest intimation that if there had been evidence of rottenness in the ladder the decision would have been otherwise.

Counsel says that *McGill v. Cleveland,* 86 N. E. 989, is to be distinguished upon the ground that in that case there was an ordinary step ladder, italicizing the word "ordinary". Again we assert that there was nothing extraordinary in the ladder from which plaintiff fell in this case.

It is claimed that in *Blundell v. Wm. A. Miller Elevator Manufacturing Co.,* 88 S. W. 103, there was no evidence tending to show that the ladder was not sound. Neither is there any intimation by the court that had there been evidence of unsoundness the Supreme Court would have affirmed the judgment, the court having reached the conclusion that the ladder in question was a simple appliance, its defects and the dangers flowing therefrom were wholly assumed by the employee, and it made no difference whether defects actually existed or not.

2. The bearing of the Starr case upon the case at bar:

We cannot honestly take credit for the extreme shrewdness assigned to us by counsel by reason of the fact that we cited in our opening brief the case of *Pacific Telephone and Telegraph Co. v. Starr,* supra. Neither are we willing to admit that we

greatly fear the force of this case. It was the most natural thing for us to do, the case being a decision of this Circuit and being the only Federal case of which we are aware in which the question of a ladder as a simple tool has been raised. It would have been mere evasion to have ignored it. We were willing to use it in our brief for the reason that we feel that this case seems to support plaintiff only because it holds that a certain ladder was not a simple tool, and that, when analyzed, it really supports our contention that most ladders, including the ladder in the case at bar, are appliances which come within the simple tool doctrine.

Apparently counsel's position is that the only kind of ladder which comes within the simple tool doctrine is a short portable ladder, either of the leaning or the step ladder variety, and that any other ladder is an extraordinary one coming within the rule of the *Starr* case. Upon reasoning such as this, it is concluded that the ladder from which Gover fell is not a simple appliance because it was not portable. We submit that a vertical stationary ladder with the rungs mortised firmly into immovable uprights is the simplest and safest form of ladder imaginable. It is not subject to collapse, as is a portable step ladder, and is not subject to the same side strain as is a portable straight ladder which may not have all four of its usual points of support properly lined up. It is therefore not equally as dangerous and complex as the ladder in the *Starr* case, as counsel contends, but is as safe

and simple an appliance as could be devised. The *Starr* case is further to be distinguished upon the ground that in it the ladder constituted virtually a place of employment—the place where the employee was active a major part of the time. In this case the ladder in question was simply an incident to the place of employment, a means of getting from the ground to the place where, for the time being, the man was actually working. Counsel also contends that the ladder in this case was a more dangerous agency than the ladder in the *Starr* case, for the reason that here the ladder was perpendicular, whereas in that case there was sufficient slant to make it possible for one who had lost his hold upon one rung to grasp another. This is a distinction that goes rather to the manner of the use put to the ladder than to any inherent defect or danger in the structure itself.

3. The appliance from which Gover fell was actually a ladder:

After using the word "ladder" three times in describing in the amended complaint the appliance upon which Gover was injured; after using this word without qualification throughout the entire trial of the case in order to describe this same appliance; and after using the word repeatedly throughout the first half of his brief, counsel, at page 15 of said brief, suddenly concludes that the ladder in question is not a ladder at all. The contention made in this regard is that the ladder was simply a means of ingress and egress from the

flume or place of work of plaintiff. Without question it was the means of reaching the place of work and the means of descent therefrom, but how this rendered it any less a ladder it is difficult to conceive. We are asked if the ladder had been used as a walk located on the ground in order to reach the flume, should we then contend that this was a ladder. Certainly we should not.

Plaintiff's contention that the ladder here in question is not a ladder at all, seems to be based upon two distinct theories. The first of these is that it could not be a ladder because it was simply a means of ingress and egress to and from the place of work. The second is that it could not be truly a ladder because it formed a part of the place of work itself.

In support of the first of these theories, the case of *O'Brien v. Northwestern Consolidated Milling Co.* (Minn.), 137 N. W. 399, is cited. In that case the ladder in question was one four or five feet in length, which was used as a means of getting from one large room in the defendant's flour mill to another, these rooms being on a slightly different level. This ladder had been used in lieu of a stair for a great many years, and was, so to speak, a main thoroughfare leading from the upper to the lower level. Under these circumstances, we believe that the court was justified in reaching the conclusion that the appliance in question was rather in the nature of a stair than a ladder, and for that

reason any defect therein was to be governed by the safe place of work doctrine rather than the simple tool and appliance doctrine. The ladder in the case at bar, being neither in the nature of a stair nor being used as a thoroughfare, does not come within the rule of the *O'Brien* case.

The case of *M. K. & T. Ry. Co. v. Steele* (Texas), 110 S. W. 171, also cited by plaintiff, refers to the ladder there under consideration as being a portion of a place of work, but in it it is apparent that no argument had been made to the effect that the ladder was a simple tool,—such a possibility having been ignored wholly in the opinion,—and it is hardly a convincing authority in favor of plaintiff's contention.

Twombley v. Consolidated Electric Light Co., 98 Me. 353, is easily distinguishable. It clearly comes within the exception laid down by the *Starr* case with regard to extraordinary, as distinguished from ordinary, ladders. We agree with the statement of the court in that case, wherein it is said:

> "It seems to us that a forty foot extension ladder is not a common tool or appliance within the meaning of those rules."

A further similarity to the *Starr* case is to be found in the fact that the defendant was an electric light company, using such extension ladder as a part of its regular business, and work upon such ladders was labor in the regular place of work, instead of merely being an incidental thereto.

The case of *Pendegrass v. St. Louis etc. Ry. Co.* (Mo.), 162 S. W. 712, is much relied upon by counsel. In it the plaintiff was employed at a pumping station operated by the defendant. One of his duties was to descend into a pit containing the pump, several times a day. This pit was from ten to twelve feet deep, and the bottom thereof was reached by means of slats nailed to the uprights forming the sides of the pit. Plaintiff was injured by one of these slats tearing loose and precipitating him to the bottom of the pit. The court reached the conclusion that this series of slats was not a ladder at all, and that there was no question of a common tool or appliance. This conclusion came because the slats appeared to be an integral part of the place of work as being the only means of ingress and egress from such place. The case differs from the case at bar by reason of the fact that the pit was a regular and invariable place of work for the injured employee; whereas Gover, while working upon the flume, was doing something wholly out of the ordinary and at which he probably would not have worked more than one or two days. The flume, therefore, and the incidental means of reaching it, could not be strictly called a place of regular work, but simply a place of temporary activity. The case further differs from the case at bar because of the anomalous nature of the series of slats, which could hardly be considered as a ladder at all. Both the testimony in the case here under consideration and a glance at Defendant's

Exhibits Nos. 1 and 2, found at pages 187 and 188 of the Transcript, remove all possible doubt as to whether or not the appliance here was strictly a ladder.

4. The inspection made prior to the accident was the best possible test.

As we pointed out in our opening brief, the requirements of the law with regard to a satisfactory inspection of the ladder were more than met by Mr. Patching, the superintendent of defendant's hatchery upon the day of the accident and shortly prior thereto. We pointed out that this constituted more than a mere visual inspection, because it consisted of an actual test of each rung of the ladder.

In spite of the uncontradicted testimony in support of such a view, counsel contends that the inspection was unsatisfactory. At page 25 of his brief, he intimates that defendant could have detected any unsound condition in the ladder if it had tapped the ladder with a mallet. We submit that no amount of tapping could be half so effective in the disclosure of weaknesses as was the placing upon each rung of the full weight of a man weighing 220 pounds. Such a test, surely, meets the requirements of inspection laid down in the quotation from *Labatt's "Master and Servant"*, Volume III, page 2815, quoted in plaintiff's brief at page 28, to the effect that

> "A mere visual or ocular inspection of external conditions does not satisfy the full measure of the master's obligations."

III.

THE DISTRICT COURT SHOULD HAVE GRANTED THE REQUEST OF DEFENDANT FOR AN INSTRUCTED VERDICT, FOR THE REASON THAT PLAINTIFF'S EVIDENCE IS INCREDIBLE AND IMPOSSIBLE OF BELIEF.

We fully realize that this court will not interfere with the judgment of the jury where the evidence is conflicting; also that questions of fact are primarily for the jury. We must here invoke the rule that the evidence must be so contrary to the common experience of mankind as to make it impossible of belief; for instance, we assert that if a plaintiff should testify that he fell from the top of the Woolworth Building, in New York City, to the pavement below, but that he suffered no bruises or objective injuries, and if a jury, upon this evidence, should decide in his favor, that an appellate court would correctly rule that such evidence was impossible of belief. We assert that the facts of the instant case are equally clear. Both the testimony of the plaintiff and the argument of his counsel make clear his claim that he did not *slide down* the ladder, or that anything impeded his fall, but to the contrary, that "he fell backwards to the ground, striking the edge of the tramway (brief for defendant in error, pp. 3-4). The plaintiff testified (p. 43):

"A. * * * I fell clear outside.
Q. You fell clear outside?
A. Yes, clear outside of that."

and (p. 41):

> "A. * * * I couldn't go straight down, my feet didn't slip off, understand, but I had that foot on the rung, and when I fell I fell back, and I tried to get my head down between my shoulders that way.
>
> Q. Your feet did not slip at all?
>
> A. This foot didn't slip until after I got out a ways."

and at page 23:

> "A. * * * My right foot being on this round threw me back out quite a ways. * * * I was out in the air and falling.
>
> Q. You fell backwards down to the ground?
>
> A. I fell down to the ground."

This was a fall of twenty-five feet (p. 21), and the plaintiff testifies that he struck the tramway, which was seven feet two inches distant from the bottom of the ladder (p. 103).

That a man of sixty-eight years of age could fall backward a distance of twenty-five feet, and land *on his back* upon a rigid tramway, without breaking any bones or showing any perceptible bruises, is, we assert, impossible. Such a thing never happened since the beginning of the world, and it will not happen in the future. There is a presumption that things have happened according to the ordinary course of nature and the ordinary habits of life (Sec. 1963, Subdivision 28, Cal. C. C. P.), and there is a further rule of evidence to the effect that courts take judicial notice of the laws of nature. Applying the law of falling bodies and the law of gravitation (which are not statutory), it is not only

improbable, but it is impossible, that the plaintiff could have fallen in the way that he describes and not have had further external evidence of the fall.

IV.

THE VERDICT IS GROSSLY EXCESSIVE.

In denying that the verdict of the jury in this case is excessive, counsel asserts that the case was so tried by him that it would be impossible to find any evidence of an attempt to create a prejudice against the defendant. We do not believe that it is necessary to find any evidence of such an attempt in the record, for the size of the verdict itself is so great as to make it clear that there must have been prejudice if the verdict is to be accounted for at all. We do, however, call the attention of the court to the question asked the witness J. R. Heckman by counsel for plaintiff when Heckman was recalled for further cross-examination. This question is found on page 171 of the Transcript, as follows:

> "Q. You have been an employer of labor for quite a while, Mr. Heckman? A. Yes, sir."

Counsel would have the jury believe that any employer of labor, particularly a large employer of labor, such as Mr. Heckman while in the employ of the Alaska Packers' Association had been shown to be, must be a person as biased and unfair toward the employee as the defendant itself. This was not the sort of question which could easily be ob-

jected to, but it was of a nature to inflame the minds of the jury against the defendant.

The age of plaintiff is, of course, the strongest reason for a reversal in this case on the ground of excessive damages. In every case which carefully lays down the rule governing the elements to be considered in assessing damages for personal injuries or death, the courts take this factor into consideration.

In *Wiezoreck v. Ferris,* 176 Cal. 353, the case of *Houghkirk v. Delaware H. & L. Co.,* 92 N. Y. 219, is cited with approval, and the following excerpt from the latter case set forth:

> "*The age* and sex, and general health and intelligence of the person, with the situation and condition of the survivors, and their relations to the deceased,—these elements furnish some basis for judgment." (Italics ours.)

Inasmuch as the case at bar is not a death case, the only thing to be considered is the age, sex, general health and intelligence, and the earning capacity of the deceased, together with the extent of the injury. It is to be noted that the judgment which was reversed in the *Wiezorek* case on the ground of excessive damages was for $10,000.

In *Louisville etc. Ry. Co. v. Stacker* (Tenn.), 6 S. W. 737, where the deceased was only of the age of fifty-seven years, as against sixty-eight years in the case at bar, a judgment of $12,000 was reversed as excessive, the court saying:

> "The age, condition, capacity of earning money, and expectation of life, are all to be considered."

In *Chesapeake etc. Ry. Co. v. Dupee's Admr.* (Ky.), 67 S. W. 15, a judgment as small as $500 was reversed where it appeared that the plaintiff was sixty-eight or seventy years of age and his injuries were not great. The court laid great emphasis in that case upon the age of the plaintiff.

Campbell v. Cornelius (Tenn.), 23 S. W. 117, is another case where the age of the plaintiff was considered. In it the verdict was for $7800, and the plaintiff was seventy-four years of age. The court said:

> "Plaintiff is shown to have been 74 years of age at the time he was injured, and, while he possessed more than ordinary vigor for one of that age, he is not entitled to as much as would be one in the meridian of life. He is by no means wholly disabled, though the evidence warrants the conclusion that he has suffered much pain, and that his health and working capacity are seriously impaired."

In *Keim v. Gilmore & P. R. Co.* (Idaho), 131 Pac. 656, where the plaintiff was seventy-six years of age, the court cut down the amount of damages from $10,000 to $9,000, although the injuries suffered were, without question, very severe. The court in that case said upon the hearing:

> "Without entering into a discussion of the evidence and the authorities cited, and from such examination, the court is of the opinion, in view of the circumstances of the case and

the age of the appellant, the judgment is excessive."

In *Anderson v. Manhattan Ry. Co.*, 21 N. Y. Supp. 1, a verdict of $5401.82 was held to be excessive, and was reduced to $2500, where the plaintiff was sixty-nine years of age, the court basing the reduction in part upon the age of plaintiff.

Counsel contends that no judgment should be reversed as excessive where the injuries consist of injuries to the spine and nervous system. In support of such a contention, two excerpts from *13 Cyc.* are set forth. The theory upon which the cases cited in *Cyc.* proceed is that where there is an injury to the spine or nervous system, it is so difficult to determine the exact extent of the damage that the verdict of the jury will not readily be reversed. An entirely opposite conclusion, however, can be reached from the same circumstances. We believe that where the injuries consist of an alleged injury to the spine and an asserted derangement of the nervous system and where the symptoms of such injury are almost wholly subjective and extremely difficult of accurate ascertainment, the court should be more than ever careful about saddling upon a defendant an obviously unjust burden in the shape of a large verdict. There are numerous authorities which support our view. We shall cite only a few of them.

In the following cases, where the injury has consisted of a claimed derangement of the nervous

system, judgments have been reversed upon the ground that the verdicts were excessive:

Edwards v. Seattle etc. Ry. Co. (Wash.), 113 Pac. 563. In this case the court reduced a judgment, the amount of which does not appear in the report of the case, to $5500, where the plaintiff, as a result of injuries, was suffering from neurasthenia, the court saying:

> "The appellant complains of the amount of the verdict. The injured respondent at the time of the trial was suffering from neurasthenia, and this was the only objective symptom remaining from the injury that medical experts were able to discover."

In *Schwartzbauer v. Great Northern Ry. Co.* (Minn.), 128 N. W. 286, a judgment for $12,000 was reduced to $8000. This reduction was made for the reason that it appeared from the record that there was a conflict of medical testimony as to whether or not the nervous condition caused by the accident would continue or not, this nervous condition being practically the only symptom that any ill effects had been suffered.

In *Becker v. Albany Ry. Co.,* 54 N. Y. Supp. 395, a judgment for $10,000 was reduced to $4,000 where the injuries consisted of an alleged derangement of the nervous system.

There are also numerous cases where injuries suffered by the plaintiff were to the spine, yet the judgment was reversed as excessive. One of these is *Hawkins v. Interurban Ry. Co.* (Iowa), 168 N. W.

234. In that case a verdict of $10,000 was reduced on appeal to $5000. In it plaintiff was fifty-five years of age at the time of the accident. He described the symptoms which he suffered at the time of the trial as being constant severe pain from the top of the shoulder blade to the base of the skull, and down his back, also loss of appetite, and was to some extent unable to sleep, took medicine for his stomach and bowels, and was unable to work for about sixty days. Some of the medical experts who testified at the trial were of the opinion that these symptoms would not be permanent, whereas other medical experts testified that they would. The court held that in view of the doubtful nature of the injuries and the conflict of the testimony, $10,000 was excessive.

The authorities which we have just cited clearly show that the courts will reduce, as excessive, judgments in cases where the injuries are to the spine and nervous system.

We submit, for the reasons stated in our opening brief and herein, that the judgment of the court below should be reversed.

Dated, San Francisco,
November 5, 1921.

Respectfully submitted,
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